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File No. 17/51

Legal Dept
& **BRANCH**

Subject:—

Opinion on the
Contract Act

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C O N T E N T S.

Legal Department File No. O. Contract/51(G.Br.)

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SMR 24-7-56
5 Copies.

Legal Department.

Messrs. Epoch Trading Company have not fulfilled the contract which that firm entered with the Milk Commissioner and which though not strictly in the form of a regular contract is to be spelt out from the correspondence. The action proposed to be taken by the Milk Commissioner viz. that of forfeiting the bank guarantee as per condition 9 in Milk Commissioner's letter No. M.C./SMP/242/B, dated 3rd August 1950 is therefore in order. The letter of guarantee is however not strictly in conformity with condition 9 but if the Bank raises no objection, there would not be any difficulty in forfeiting the guarantee. According to the letter of guarantee the Bank has undertaken to indemnify the Milk Commissioner to the extent of Rs. 13,500 against any loss caused to him by the firms failure to fulfil the contract and the Milk Commissioner is presumably in a position to prove the loss if the Bank insists on it.

The draft letter to the Bank at page 33 as slightly amended is in order.

Id./P.M.L.

Additional Secretary to Government.

U.O. to Milk Commr., No. 4-100, dated the 19th March 1951.

SMP 24-7-56
6 Copies.

Legal Department.

The question for consideration is whether the view taken by the Milk Commissioner in his note dated 27th March 1951 that the quotation sent by M/S Ley land Motors Ltd. for supply of 8 'Ley land' articulator vehicles on 22nd July 1950 at the rate of Rs. 54000 per vehicle was a firm one and that no conditions of the type now visualised were attached to it and that Government is not responsible for any increase or decrease in duty etc., is correct.

The view taken by the Milk Commissioner does not appear to be correct. M/S Leyland Motors Ltd. had made it quite clear in their quotation dated 22nd July 1950 that the said quotation was subject to the Leyland Co's Terms of Business and the placing of an Order with the Co. was to be deemed to be an acceptance of the said Terms of Business which were set out in full at the back of the quotation(Please see the note "Terms of Business" at the bottom of the quotation p. 1). The first condition ran as follows:-

"1 Quotations:- Quotations are made subject to fluctuations in prices whether occurring before or after acceptance and to the customer's credit being approved. They may be withdrawn at any time before acceptance and unless otherwise specified, are only open for acceptance within 21 days."

The placing of the order by the Milk Commissioner with the Co. on 21st December 1950 was therefore to be deemed an acceptance of the above condition. After this offer and acceptance, there was a rise in the price of types and the Co. made an addition of £ 54 per chassis. This increase was accepted by the Milk Commissioner. The 2nd increase in the price of tyres will therefore also be binding on the Milk Commissioner as the contract is subject to fluctuations in prices whether before or after accept-

-ance.

The contract is a c.i.f. contract and in the first quotation import duty was shown to be borne by the Government. If so any increase in the import duty will have also to be borne by Government.

Time ~~xk~~ is not of the essence of the contract in this case and therefore the Co, cannot be held responsible for late delivery of the goods. In the terms of Business, the Co. has made it clear that the Co. undertakes to make every endeavour to execute each order within the period quoted, reckoned from the date of receipt by the C. of all instructions and information necessary for the execution of the work but is unable to guarantee that circumstances not in the control of the Co, may not interfere and that no liability shall attach to the Co. for delay in delivery, ~~xxxxxxx~~ howsoever arising, or for any contingent or consequential loss or damage arising from such delay(Please see condition 4).

Id./.....

Additional Secretary to Government.

U.R. to M.C.No. G-126, dated the 4th April 1951.

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4 Copies.

The view expressed by Honourable Minister for Civil Supplies at page 177 ante is correct.

Government by their letter dated the 18th April 1950 directed the Collector, Bijapur that the damaged Jowar should be sorted and that portion which is fit to be used as cattle feed should be sold as such and the remaining portion should be sold for manure and in case there is no demand for being purchased for manurial use, should be destroyed. The Collector was not required to take the previous sanction of Government before the sale in respect thereof was finally sanctioned. In pursuance of the aforesaid letter it appears that the Collector directed the District Supply Officer to take action. The District Supply Officer accordingly held aution sale with a stipulation that the acceptance of the bid was subject to confirmation by Collector. It appears that the sales were accordingly confirmed by the Collector and the bidders were informed of the Collector's acceptance of their bids. In these circumstances the question for consideration of the R.L.A. is whether the auction sale is complete, and if so, the cancellation thereof would involve Government in legal proceedings.

"An auction is a sale by public competition to the highest bidder. Such sales are of two kinds with reserve and without reserve. An auction is without reserve when the goods are to be sold to the highest bidder whether the sum be equivalent to the real value or not". (see Iyer's Law of Contract p. 26). In Warlow vs. Harrison 1858 120 E.R. 925 it was held by majority of the judges that "A contract is concluded the moment the highest bonafide bid was made". It is presumed in the present case the auction sales were held without reserve. If so, on the acceptance of the highest bids by the Collector there would arise concluded contracts. Consequently, the sales are complete and if they are cancelled

by Government, Government would be involved in legal proceedings.

Id./.....

Additional Secretary to Government.

U.R. to C.S.D.,No. G-235, dated the 15th June 1961.

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5 Copies.

Legal Department.

Under the security bond given in Appendix 1 B of the Financial Publications No. 1 the sureties have to declare as follows:-

"We hereby declare ourselves sureties for the abovesaid A.B. that he shall do and perform all that he has ab we under-. taken to do and perform, and in case of his making default therein, we hereby bind ourselves jointly and severally to forfeit to the Governor the sum of in which the abovesaid A.B. has bound himself, or such other lesser sum as shall be deemed to be sufficient by the to cover any loss or damage which the Governor may sustain by reason of such default."

The sureties under this bond are therefore co-sureties and they are jointly and severally liable to make good the loss upto Rs. 4000 only. Under section 146 of the Indian Contract Act, each such co-surety will be liable to pay an equal share of the whole debt or such part of it as remains unpaid by the principal debter. Even though the whole amount can be recovered from one surety, once it is so recovered it cannot again be recovered from the other surety. The first surety can sue the second one for contribution. The view taken in the Finance Department note does not appear to be correct.

Id./.....

Additional Secretary to Government.

U.R. to C.S.D.,No. G-263, dated the 3rd July 1951.

SMR 24-7-56
4 Copies.

Legal Department.

The pandal in question was erected on the ground rented by Government. What was hired by Government was not the material required for constructing pendal but the pandal itself. As the pandal was fastened to the earth, it will have to be treated as immovable property(Please see the definition of immovable property in section 3(24)of the Bombay General Clauses Act, 1904)and the provisions of section 103 of the Transfer of Property Act, 1882 will apply to this case. It is true that under section 108(m)the lessee is bound to restore the property to the lessor in as good condition as it was in at the time when the lessee was put in possession. But this obligation is subject to section 108(e)and does not apply if the property is destroyed by a fire not caused by the negligence of the lessee(p. 695 of Mulla's Transfer of Property Act, 3rd edn.). In the East Indian Distilleries and Factories Ltd. Vs, Mathias I.L.R. 51 Madras 994, Coults Trotter C.J. has observed that "in India the section 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden upon his shoulders by his convenant". Even assuming that section 108(e)of Transfer of Property Act is inapplicable the principle that a person is not liable for damage caused by fire beginning accidentally in his premises(Collingwood Vs, Home and Colonial Stores, 1936 A.E.R. 200)will apply. There is therefore no legal liability on Government to make good the loss occasioned in this case by accidental fire which was not caused due to any negligence on the part of Government.

As regards furniture, the position of Government

is that of a bailee. Government has undertaken the liability for major repairs. Under section 152 of the Indian Contract Act, the bailee, in the absence of a specal contract, is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own similar goods. In this case it is not disputed that Government has taken proper care of the goods. No liability therefore attached to Government for loss or damage to the furniture due to the fire.

Id./.....

Additional Secretary to Government.

U.R. to F.D.,No. G-385, dated the 23rd August 1951.

SMR 25-7-56
4 Copies.

It is true that in 36 Bombay Law Reporter 568 it was held by Justice Mirza that the contract in order to be binding on Government by reason of section 30 of the Government of India Act should have been evidenced by a formal document such as an indenture or a deed and not merely by correspondence. This view was not approved in Secretary of State Vs. Bhagwandas Gordhandas 40 B.L.R. 19 where Beaumont C.J. and Blackwell J. held that section 30 of the Government of India Act does not necessarily require a formal document and can be spelt from correspondence. The correspondence in respect of the contract should have been carried on in the name of the Governor of the State and the defence that the contract is not strictly in conformity with section 175(3) of the Government of India Act, 1935 would no doubt be available to the party. However, it can be contended on behalf of Government that the party proceeded to do the loading and unloading work in pursuance of the Mamlatdar's letter which would mean part performance of the contract and is therefore liable for loss occasioned to the foodgrains whilst in his custody.

Id./.....

Additional Secretary to Government.

U.R. to C.S.D., No. G-553, dated the 10th November 1951.

SMR 25-7-56
4 Copies.

Office of the R.L.A.

Under section 128 of the Indian Contract Act, the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. In this case as the principal debtor is bound in the sum of Rs.3,000/- the sureties are liable to pay Rs. 3,000/- either jointly or severally. If Rs. 3,000/- are paid by one surety, he can seek contribution from the other but Government cannot recover Rs. 3,000/- from each . In the bond at page 44 ante it is true that the sureties have bound themselves in the sum of Rs,3,000/- or such other sum as is sufficient to reimburse Government of the loss which Government may sustain by reason of the default committed by the principal debtor. But curiously enough the words 'such lesser sum' occuring in the prescribed bond under Finance Rule 40 in Appendix 1-B are absent. Where the guarantee is ambiguous, the proper course is to look at the surrounding circumstances, in order to see what was the subject matter which the parties had in contemplation at the time the guarantee was given; not for the purpose of altering the terms of the guarantee by words of month passing at the time but as part of the conduct of the parties to determine what was the scope and object of the guarantee(see Chitty on contracts p. 1033). The bond executed by the sureties is a fidelity bond and they have given a continuing guarantee limited in the amount of Rs, 3,000/- and if the words 'such other sum as is sufficient to reimburse Government of the loss which Government may sustain" in the latter part of the bond are to be construed as extending the guarantee beyond Rs, 3,000/-, the provision in the first part of bond limiting the guarantee in the sum of Rs. 3,000/- would be meaningless. Consequently the proper construction of the bond would be to limit the guarantee to Rs.3,000/- or to a lesser amount in case the amount of loss suffered by Government is less than Rs. 3,000/-. The view taken by the Collector of Dharwar is not correct.

Id./..... 13/12
Remembrancer of Legal Affairs.

U.R. to C.S.D., No. G-629, dated the 14th December 1951.

SMR 25-7-56
4 Copies.

Legal Department.

The question for R.L.A.'s consideration are:-

(i)Whether the contractor can be held liable for cheating the Government by supplying the Hopper Machines with sieves of meshes Nos. 2 or 3 instead of No. 4 as contracted for;

(ii)Whether he can be held civilly liable for the same.

(i)As regards criminal liability, two of the requirements of the offence of cheating are(1)Deception and(2)Fraudulent or dishonest inducement. Here the salient facts which negative these are--

(1) The contractor did not prepare the sieves himself but got them prepared from another according to a sample approved by Government.

(2)The Contractor himself has no knowledge of the differences between No. 4 sieves and No. 3 or No. 2 sieves.

(3) The differences between these sieves is not discernible by a layman.

(4)The contractor did not stand to gain financially by supplying No. 3 or No. 2 instead of No. 4.

A prosecution for cheating will not therefore lie.

(ii) As regards civil liability, the machines having been accepted and the price thereof being paid and the deposit returned to the contractor, it appears that the machines would be deemed to have been accepted under section 42 of the Indian Sale of Goods Act. If there is any remedy to claim any damages from the contractor for the breach of the agreement inasmuch as he supplied machines with sieves of Nos. 2 and 3 instead of No. 4, it would be under s 73 of the Indian Contract Act. Under that provision, compensation for any loss or damage can be claimed only when the loss or damage naturally arose in the usual course of things from such breach. Generally it is quite settled that on a contract to supply goods of a particular sort which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach(see Williams Brothers Vs. Ed, T.Agius.

Ltd., 1914 A.C. 510). In the present case the Civil Supplies Department considers that the cost of a sieve of meshes Nos. 2 and 3 would perhaps be the same as that of a No. 4 mesh sieve. If the price of the sieves was the same even at the time when the breach of the agreement was discovered, it appears that the contractor would not be liable to damages for replacing the sieves Nos. 2&3 by sieve No. 4. Moreover, there is nothing on record to show that Government has suffered any special damage by the supply of machines with sieves Nos. 2 and 3 instead of No. 4. In the circumstances, particularly in view of the fact that the breach of the contract was discovered some months after the machines were accepted and the contract was treated as fulfilled and the sieves Nos. 2 and 3 have since been used up and cannot now be returned to the contractor, it appears desirable to settle the claim amicably if possible and if the contractor is adamant, to drop it.

Id./.....

Additional Secretary to Government.

U.O. to C.S.D.,No. G-586, dated the 30th November 1951.

SMR 25-7-56
4 Copies.